**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1876 OF 2005**

1. Air India Staff Colony Association-1, )
   Through its Chairman/Secretary, )
   Air India Staff Colony, Kalina, )
   Mumbai - 400 029 (through its President,)
   V.T. Tomichan) )

2. Air India Modern School (English Medium))
   Through its Headmistress )
   Air India Staff Colony, Kalina, )
   Mumbai - 400 029 (through Franc, )
   Fernandes, Headmistress) )..Petitioners

V/s.

1. Moreshwar V. Patil )
   Manda Kunj, 2nd Floor, )
   Datta Mandir Road, Vakola Pipeline, )
   Santacruz (East), Mumbai - 400 055. )

2. State of Maharashtra (through the Dy. )
   Director of Education, Mumbai Region, )
   Charni Road, Mumbai) )

3. Educational Inspector (WZ), )
   T.Y. College Compound, )
   Jogeshwari (E), Mumbai - 400 060 )..Respondents

Ms.Anupama B. Shah for the Petitioners.
Mr.Shaikh Nasir Masih for Respondent No.1.
Ms.Mamta Sadh, AGP for Respondent Nos.2 and 3.

**CORAM : V.M. KANADE, J.**

**DATED : JUNE 20, 2007**

**ORAL JUDGMENT :-**

1. By this petition, the petitioner which is a

recognised aided school as defined under the provision of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, hereinafter referred to as the "MEPS Act" is challenging the order passed by the Presiding Officer, School Tribunal, Mumbai, in Appeal No.MUM/32/2000 which was filed by the respondent no.1 whereby the Tribunal was pleased to direct the petitioner herein, after allowing the appeal, to reinstate the respondent no.1 to the post of Assistant Teacher with continuity of service and full backwages and set aside the order of termination dated 30th March, 2000 which was passed by the petitioner herein. The petitioner is also challenging and seeking appropriate writ, order and direction directing the respondent nos.2 and 3 viz. the Deputy Director of Education, Mumbai Region and Educational Inspector (WZ) to grant approval to the post of respondent no.1 and thereafter to release his salary.

**FACTS :**

2. The petitioner no.2 herein is an aided school and petitioner no.1 is an association which has been established for administering the said school. The petitioner school is receiving 100% aid from the Government.

3. An Advertisement was issued by the petitioner which was published in the Times of India dated 8th April, 1998 inviting applications for the post of Assistant Teachers and pursuant to the said advertisement, the respondent no.1 applied for the said post. Thereafter, he was interviewed by the Selection Committee and an order of appointment was issued. In Clause 2 of the said letter of appointment it has been specifically mentioned that the appointment was purely temporary on probation for a period of two years. It is also mentioned that respondent no.1 was appointed as a Assistant Teacher in the school in the scale of 1200-2040 with effect from 13th June, 1998. The letter of appointment also in terms states that the terms of the employment of the petitioner would be governed by the Revised Secondary Schools Code or the MEPS Act and

Rules framed thereunder. Thereafter, on 13th June, 1998, a further letter was issued wherein it was mentioned that the appointment of the petitioner was subject to approval from the Education Department and if approval is not granted, he would be entitled to get the consolidated pay of Rs.1000/-. The petitioner acknowledged and accepted the service conditions as stated in the said letter. It is the case of the petitioner that the respondent no.3 had sanctioned 27 posts which consisted of one post of Head Master and 26 posts of teaching staff under the graduate as well as undergraduate scale. Thereafter, the petitioner made an application seeking approval of respondent no.1 to the said post and during the first year, approval was granted. However, during the second year, according to the petitioner, department did not grant approval to the post of respondent no.1 and therefore, they had no option but to terminate the services of respondent no.1.

4. The respondent no.1 challenged the said order of termination by filing an appeal before the School Tribunal. Before the School Tribunal, respondent no.1

contended that his appointment was made on probation for a period of two years and as such the petitioner was not entitled to terminate the services on the ground of approval not been granted by the respondent. The petitioner on the contrary submitted that since the appointment was made for a period of two years, they had right to terminate his services before the completion of two years. Though the Educational Inspector was made a party respondent before the Tribunal, no reply was filed by the Education Inspector and the Tribunal set aside the order of termination which was passed by the Management and directed reinstatement with full backwages. The petitioner being aggrieved by the said order has filed this petition. The petitioner is also seeking a direction directing the respondents to grant approval to the post of the respondent no.1.

5. Respondent nos.2 and 3 have filed two affidavits in reply, one dated 12th December, 2005 which affidavit is filed by B.A. Sonawane, Deputy Education Inspector, West Zone, and the other affidavit which is filed by Smt.A.B. Wagh, Deputy Education Inspector, West Zone

dated 11th October, 2006. In the first affidavit dated 12th December, 2005 in para 3 it is stated that appointment of respondent no.1 was made by the School authorities in the undergraduate scale i.e. SSC/HSC, D.Ed and not in the Graduate Scale. It is stated that this was evident from the letter of appointment dated 10th June, 1998. It is further stated that in Writ Petition No.4151/98, this Court had held that the proper qualification of teachers who were appointed in the primary section of the secondary school was D.Ed and not B.Ed. It is further stated that on the basis of the said decision which was given by this Court, the Government had issued a Circular dated 17th January, 2001 directing all private secondary schools that 75% of the teachers in the primary section i.e. from Vth to VIIth standard should be appointed in undergraduate scale, 25% posts should be kept for appointing B.A.B.Ed qualified teachers. It was further contended that since respondent no.1 was appointed in the undergraduate scale by the first Management, the approval was not granted and accordingly, by letter dated 8th November, 2005, the Management was informed that approval to the appointment

of respondent no.1 could not be granted. It was further stated that the proposal for approval was rejected in view of the circular dated 17th January, 2001. In the second affidavit dated 11th October, 2006, it is stated that the appointment of respondent no.1 had been made illegally by the petitioners herein since the first respondent was holding the qualification B.A.,B.Ed. yet he had been appointed for the post of which requisite qualification was SSC/HSC, D.Ed. Therefore in view of the law laid down by this Court by the Full Bench in Writ Petition No.4159/98 dated 5th May, 2005, the petitioner could not have been appointed in the primary section of the secondary school and therefore, B.Ed. qualification could not be considered as equivalent to the requisite qualification for appointment in the primary section and therefore, the petitioner was not entitled to seek a direction of granting approval to the post of respondent no.1. It was further stated that prior to the appointment of respondent no.1, two other teachers had been appointed and their services were also terminated on the same ground and during the pendency of the appeal which those teachers had filed in the

Tribunal, the petitioner had been appointed on the said post and therefore on that count also, his appointment was illegal and therefore, the question of granting approval to the appointment of respondent no.1 did not arise. Further it is stated in the affidavit in para 6 that in respect of teachers who are appointed to teach in the secondary schools in respect of classes V to VII, it was expected that three posts could be filled up by appointing a candidate holding qualification of SSC/HSC, D.Ed. and one post was filled up by appointing candidate holding B.A./B.Sc., B.Ed qualification. In para 9, it is stated that while rejecting the proposal of approval, the following reasons had been given :-

> "(i) Shri Moreshwar Patil is holding the qualification of B.A., B.Ed. has been appointed on the post of trained under graduate post for which the requisite qualification is SSC/HSC, D.Ed.
>
> (ii) The proposal submitted by the Management is incomplete and not clear as the Management has stated in the proposal that the appointment of 1st Respondent has been made against the post occupied by Smt.Pujari and whereas the Appeal filed by Smt.Khare was pending before the School Tribunal and the proposal submitted for approval of appointment of Smt.Pujari has already been rejected.

(iii) Similarly since the appointment has been made in the year 1998 and the proposal has been submitted in the year 2005 and therefore since the proposal is submitted with undue delay the Education Department by its letter dated 8th November, 2005 rejected the approval to the appointment of Respondent No.1 - Shri Moreshwar Patil for the reasons recorded above."

**SUBMISSIONS :**

6. The learned Counsel appearing on behalf of the petitioner vehemently urged firstly that the order passed by the Tribunal was liable to be set aside. She submitted that the petitioner was appointed on probation for a period of two years and therefore, the management had a right to terminate the services before the completion of two years. In respect of the said submission, she relied on the judgment of the Apex Court in the case of **Bharatiya Gramin Punarrachana Sanstha V/s. Vijay Kumar and Others reported in (2002) 6 SCC page 707.** She also relied on the Judgment of a learned Judge of this Court in the case of **Shikshan Mandal, Wardha and another V/s. Presiding Officer, School Tribunal, Nagpur and others, reported in 2001 (1) Mh.L.J. Page 606** and also a judgment of the Apex Court

in the case of **Management, Kalpataru Vidya Samasthe (R) V/s. S.B. Gupta reported in 2005 (8) Judgment Today Page 267**. She further submitted that the appointment of the respondent no.1 was a conditional appointment and in the corrigendum to the letter of appointment, the Management had specifically made it clear that the said appointment was subject to the approval which was granted by the Education Officer and that if approval was not granted, his services were liable to be terminated. She submitted that respondent no.1 had acknowledged this fact and had accepted the said condition by affixing his signature at the bottom of the said letter. She submitted therefore, it was not open now for the respondent no.1 to challenge the order of termination.

7. She further submitted that alternatively, the petitioners were entitled to seek a direction from this Court directing the respondents to grant approval to the appointment of respondent no.1. She submitted that the respondent no.1 had been appointed in a regular vacancy and that 26 posts were sanctioned by the Government and

the respondent no.1 had been appointed on the undergraduate scale in the secondary school and therefore, the plea raised by the respondents in their reply that the respondent no.1 is working in the primary section was incorrect. She submitted that the ratio of the Full Bench Judgment laid down in Writ Petition No.4159/98 was not applicable to the facts of the present case since respondent no.1 admittedly was working in the secondary school and no objection had been raised by the respondent nos.2 and 3 before the Tribunal and therefore, it was not open for the respondent nos.2 and 3 to raise this objection for the first time in this Court.

8. The learned Counsel for the respondent no.1 submitted that the Tribunal after taking into consideration the letter of appointment had correctly come to the conclusion that the termination of his services by the respondent no.1 for the reasons stated by them in their reply was patently illegal and therefore, directed reinstatement with full backwages. He submitted that respondent no.1 was admittedly

teaching the VIII to X classes and this fact has not been disputed by the respondent nos.2 and 3. He submitted that in any case, it was either the petitioner herein or the respondent nos.2 and 3 were liable to pay backwages to respondent no.1.

9. The learned AGP appearing on behalf of respondent nos.2 and 3 submitted that the petition was liable to be dismissed since the only ground on which the petitioner had terminated the services of respondent no.1 was on account of approval not been granted by respondent nos.2 and 3. She submitted that it was the primary responsibility of the management to pay salary of teachers and therefore, respondent nos.2 and 3 were not liable in any way to pay salary. She submitted that initially, direction has been by this Court to the respondents to pay the salary of the respondent no.1, however, thereafter, a review application was filed and to a certain extent, the said order was modified. She submitted that in view of the judgment delivered by the Full Bench of this Court, the Education Department had no option but to refuse to grant approval to the

appointment of respondent no.1. She submitted that accordingly, a circular had been issued by the Government to all the schools and this circular had been followed by the schools in Mumbai and elsewhere. She invited my attention to Schedule B of the MEPS Act wherein it has been mentioned that the pay scale of primary teacher was 1200-2040. Thereafter, she invited my attention to the letter of appointment in which it has been mentioned that the respondent no.1 was appointed on the pay scale of Rs.1200-2040. She submitted that this itself clearly established that respondent no.1 was appointed in the primary section of the secondary school and therefore, there was no question of granting approval to his appointment since the qualification of the respondent no.1 was B.A.,B.Ed whereas as laid down by the Full Bench of this Court, requisite qualification of a teacher working in the primary school was SSC/HSC, D.Ed. She submitted that therefore, the respondent no.1 did not possess the requisite qualification as per law laid down by this Court and therefore, the respondents had no other option but to refuse to grant approval to the appointment of

respondent no.1 to the post of Assistant Teacher. She invited my attention to the various observations which were made by the Full Bench of this Court in Writ Petition No.4159/98. She submitted that therefore, the petition was liable to be dismissed.

**FINDINGS AND CONCLUSION :**

10. I have given my anxious consideration to the submissions made by the learned Counsel appearing on behalf of the petitioner, respondent no.1 and respondent nos.2 and 3. Before deciding the rival contentions made by the respective counsel appearing on behalf of the parties, it would be essential to consider some of the provisions of the MEPS Act for the purpose of properly deciding the controversy which is raised in this petition. Section 5(2) and (3) of the MEPS Act reads as under :-

> "5(2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

> (3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice."

11. A perusal of the said provision reveals that a teacher who is appointed on probation for a period of two years on his completion of period of probation attains permanency by virtue of the deeming clause which is found in the said provision. It is however well settled position that before the expiry of two years, if it is found that the services of teacher are not found to be satisfactory, the Management would have a right to terminate the services on account of his non-satisfactory performance. However, if the order of termination casts a stigma on the teacher and the said order has been passed on account of any misconduct, then the Management has no other option but to hold domestic inquiry and thereafter give an opportunity to the teacher to give his explanation and thereafter, if he is found guilty, an order of termination can be passed. Similarly, a simplicitor order of termination can also

be passed if there is sufficient material before the Management to show that the services of a teacher were not found satisfactory. There is no provision, however, under the Act authorising the management to terminate the services of a teacher merely on account of approval not been granted by the Education Officer. In the present case, it is an admitted position that in view of the various averments made by the management in the affidavit-in-reply filed in the appeal which is filed by the respondent no.1 before the Tribunal as also averments made in this petition that the services of the respondent no.1 were terminated since approval was not granted by the respondent nos.2 and 3.

12. Schedule B of MEPS Act lays down minimum qualifications of primary teachers and secondary teachers and teachers working in the junior college. A perusal of the aforesaid two schedules indicate that in respect of secondary schools, a person having a qualification of B.A.B.Ed can be appointed in the secondary school. At the same time, it is also mentioned in the said schedule that a person having the

qualification of B.A.B.Ed. can be appointed in the Under-Graduate Scale. The pay scale which is payable to Assistant Teacher in the secondary school is given in Schedule C and teacher who is working in the course of undergraduate pay scale is entitled to receive an salary of 1200-2040.

13. The aforesaid provisions reveal that it is possible that a person who is having qualification of B.A.B.Ed at the relevant time may be appointed on the post of undergraduate teacher wherein the pay scale is 1200-2040. Taking into consideration the said schedule B and C, it can be seen that the submissions made by the learned AGP appearing on behalf of the State that merely because the pay scale which is mentioned in the letter of appointment of the respondent no.1 is shown as 1200-2040, does not mean that he has been appointed in a primary school. The letter of appointment has to read as a whole and the said letter of appointment clearly mentions that provisions of the MEPS Act and revised secondary code are applicable in this case.

14. The respondent nos.2 and 3 have not raised this objection before the School Tribunal where they have made as party respondents. Respondent Nos.2 and 3 had an opportunity to raise this objection before the School Tribunal and they could have mentioned that the respondent no.1 was appointed in the primary section and therefore, the provisions of Section 9 of MEPS Act are not applicable. Though this opportunity was available to the respondent nos. 2 and 3, they have chosen to remain silent and the Tribunal, therefore, has proceeded on the footing that the respondent no.1 was working in the secondary section of the petitioner no.2 school. The petitioners also do not dispute the fact that the respondent no.1 was appointed in the secondary section and he was taking classes VIII to X standard. On the same analysis, therefore, the reliance placed by the respondent nos.2 and 3 of the Full Bench Judgment of this Court in Writ Petition No.4159/98 dated 5th May, 2005 is misplaced. It is, therefore, apparent that the respondents have proceeded to reject the proposal for approval by treating the respondent no.1 as a teacher who was appointed in the primary section though the

material on record clearly establishes the fact that he was appointed in the secondary division of the petitioners' school. The averments made in the two affidavits which have been filed by the respondent nos.2 and 3 dated 12th December, 2005 and 11th October, 2006 clearly establish, therefore, that the respondent nos.2 and 3 have proceeded on a totally wrong assumption and they apparently came to the said conclusion that the respondent no.1 was working in a primary school on the basis of the pay scale which is mentioned in the letter of appointment of respondent no.1. As indicated hereinabove, Schedule C to MEPS Act clearly permits a person who is having a qualification of B.A.B.Ed. can at a particular point of time be appointed in undergraduate scale as long as any post in the graduate scale is not available. It is an admitted position that the respondents have sanctioned 26 posts in the secondary division of the petitioner no.2 school. The circular, therefore, on which reliance is placed by the respondents, in my view, is misplaced and therefore, the respondent nos.2 and 3 have erred in relying on the said circular which has been issued pursuant to the decision

taken by the Full Bench of this Court in the said Writ Petition No.4159/98.

15. Further, the reasons which have been stated for rejecting the proposal which have been reproduced in para 9 of the affidavit of Wagh dated 11th October, 2006 also reveal that the reasons given for rejecting the approval cannot be sustained.

16. The learned AGP appearing on behalf of the respondents has submitted that the department had communicated its decision of not granting approval to the post of respondent no.1 by its letter dated 29th September, 2005. It is submitted that this order has not been challenged in this petition. It is submitted that in fact, the proposal for approval had never been rejected by the respondent nos.2 and 3 prior to 29th September, 2005. This submission made by the learned AGP appearing on behalf of the State cannot be accepted. In the affidavit dated 11th October, 2006 affirmed by Smt.A.B. Wagh, Deputy Education Inspector, she has stated in para 4 which reads as under :-

> "I say that in this background once again the Petitioners illegally appointed the 1st Respondent - Shri Moreshwar Patil, B.A., B.Ed., with effect from 13th June, 1998 when the Appeal filed by Smt.Khare was still then pending before the School Tribunal and therefore these Respondents have rejected the proposal for individual approval of appointment of Shri Moreshwar Patil - 1st Respondent herein"

17. This submission which is made on oath does not support the submission made by the learned AGP appearing on behalf of the State. At this stage, it is necessary to point out that this Court had by order dated 14th December, 2005 had directed the respondent nos.2 and 3 to make arrangements for the payment of salary of respondent no.1. The said order reads as under :-

> "CORAM : P.V. KAKADE, J.
> DATED : 14TH DEC., 2005
>
> P.C. :-
>
> 1. Heard both sides. Perused the record.
>
> 2. Rule.
>
> 3. It is apparent from the record that the

> teacher is continue in service by virtue of the order of the School Tribunal. It is directed that he shall be continued in service pending hearing of the petition which is expedited. The State - respondent Nos.2 and 3 are directed to make arrangements for payment of salary of respondent No.1 for the said purpose. This direction is without prejudice to the rights and contentions of the concerned parties which shall be adjudicated at the time of final hearing and subject to the outcome of the petition."

18. Thereafter, a review petition was filed by the Education Inspector vide Lodging No.44/2006 wherein this Court (Coram : P.V. Kakade, J.) passed the following Order :-

> "1. Heard the learned Counsel for all the parties. Perused the petition. Delay stands condoned.
>
> 2. After hearing the learned Counsel for the petitioner, it appears that the petitioner seeks modification of the order dated 14/12/2005. By this order the State - Respondent nos.2 and 3 were directed to make arrangements for payment of salary of Respondent no.1. Now the review is sought for modification to the effect that the directions be issued to the State Government as to from which grants the salary amount should be paid. In my view, it is for the State to decide the head of grants from which the payment is to be made and it is not the court to make such direction. In view of this position, review has no merits and stands dismissed with no order as to costs."

19. The submission of the learned AGP that interim order passed by this court dated 14th December, 2005 was modified cannot be accepted since this Court had dismissed the review petition and the earlier direction had not been modified. In the meantime, the respondent filed the contempt petition in this Court which is still pending.

20. In the light of the above decision,in my view, there is no infirmity in the order passed by the School Tribunal and the said order is confirmed and the prayer made in the petition for setting aside the order passed by the Tribunal is, therefore, not accepted and to that extent there is no merit in the submission made by the learned Counsel appearing on behalf of the petitioner. The reliance which is placed by the learned Counsel for the petitioner on the judgment of the Apex Court in the case of **Bhartiya Gramin Punarrachana Sanstha (supra)** will not be of any assistance to the petitioner since the ratio of the said judgment will not apply to the facts of the present case. In the present case, as held

hereinabove, the respondent nos.2 and 3 had not granted approval and therefore, the services of the teachers had been terminated. The observations which are made by the Apex Court in para 7 of the said judgment are, therefore, in the context of the facts of the said case and therefore, the ratio will not apply to the facts of the present case. Similarly, the judgment of the Apex Court in the case of **Management, Kalptaru Vidya Samasthe (R) V/s. S.B. Gupta (supra)** also will not apply to the facts of the present case since in the said case, the appointment was made for a specific period of time and that the said appointment came to an end by efflux of time. In the said judgment, the Apex Court had held that person holding such post had no right to continue in the said post and further the relevant provisions which are contained in Section 5 of the MEPS Act do not appear to be present in the **Kalptaru's case** and therefore, the ratio of the said case will not apply to the facts of the present case. Further, the ratio of the said judgment in **Shikshan Mandal (supra)** will not apply to the facts of the present case since the facts in the said case are entirely different and it was

mentioned in the said case that an employee was not entitled to have a lien over service during probation

21. Second submission, however, made by the learned Counsel for the petitioner seeking direction to the respondents to grant approval to the post of respondent no.1, however, will have to be granted for the reasons stated in the foregoing paragraphs.

22. In the result, the petition is partly allowed. The judgment and order passed by the School Tribunal is confirmed. The respondent nos.2 and 3 are directed to grant approval to the post of respondent no.1 with effect from the academic year 1998-99 and accordingly, disburse the salary to the respondent no.1. It is, however, clarified that till such time it not disbursed by respondent nos.2 and 3, the petitioner herein shall pay the salary to the respondent no.1 and claim reimbursement from respondent nos.2 and 3.

. The petition is disposed of in the above terms.

**(V.M. KANADE, J.)**